IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 405 77-912

ALASKA ROUGHNECKS AND DRILLERS ASSOCIATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 75-3049 (9th Circuit Court of Appeals)

MOBIL OIL CORPORATION,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 75-3328 (9th Circuit Court of Appeals)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioner, Alaska Roughnecks and Drillers Association, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above cases on August 19, 1977.

OPINIONS BELOW

The opinion of the National Labor Relations Board is reported at 219 N.L.R.B. No. 91, the opinion of the Court of Appeals for the Ninth Circuit is reported at 555 F.2d 732.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was made and entered on June 14, 1977, and a copy thereof is appended to this Petition in the Appendix at pages 35a-45a. The judgments of the Court of Appeals for the Ninth Circuit were made and entered on August 19, 1977, and copies thereof are appended to this Petition in the Appendix at pages 46a-47a. An order granting an extension of time to file a petition for writ of certiorari was entered on November 5, 1977, in which the Court extended the time until December 23, 1977, and a copy of that order is appended to this Petition in the Appendix at page 50a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Whether an employer who is not found to be an employer in a representation proceeding under section 9(c) of the National Labor Relations Act is denied procedural due process if later found to be a joint employer for purposes of remedying unfair labor practices?

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

The pertinent portions of Sections 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. Sections

158(a)(1) and (5) (1970)) and Section 9(c) of the National Labor Relations Act (29 U.S.C. Section 159(c)) and 29 C.F.R. Sections 102.61-102.63 are set forth in the Appendix at pages 51a-60a.

STATEMENT

The above consolidated cases came to be heard before the Court upon Petitions of Alaska Roughnecks and Drillers Association and Mobil Oil Corporation to review an Order of the National Labor Relations Board which held that Mobil Oil Company violated Sections 8(a)(1) and (5) of the National Labor Relations Act (29 U.S.C. Sections 158(a)(1) and (5) (1970). It had found that Mobil unlawfully refused to bargain with the union representing the employees of Santa Fe Drilling Company which had subcontracted with Mobil to perform drilling operations on an offshore oil drilling platform. This decision was based on the following facts.

The situs of this case is an offshore platform situated in the Cook Inlet near Anchorage, Alaska. The platform in question is owned three-fourths by Mobil Oil Corporation and one-fourth by Union Oil Company. Mobil is the operator of the platform and has been since 1966. Upon completion of the platform, drilling operations were commenced and a number of producing wells were drilled from the platform. As each well was completed, producing operations began. The initial drilling program lasted until 1969.

Mobil Oil Corporation, hereinafter referred to as "Mobil", is a Delaware Corporation engaged in several states of the United States, including Alaska, in the production and distribution of petroleum products. It is

an employer engaged in and affecting commerce within Sections 2(2), 6 and 7 of the National Labor Relations Act as amended.

The Alaska Roughnecks and Drillers Association, hereinafter referred to as "union", is a labor organization within Section 2(5) of the National Labor Relations Act as amended.

From 1969 through the spring of 1974 Mobil kept in effect the contract with Santa Fe Drilling Company to perform the production and maintenance operation on the Granite Point Platform. The only workers on the platform during this period of time have been Mobil's supervisors and 15 to 20 employees. The majority of the employees remained constant over the years.

Throughout both the drilling and production phases, the essential relationship between Mobil and Santa Fe was defined by a series of contracts, the latest of which became effective on June 1, 1972. Under this contract, Santa Fe was obligated to furnish employees "as required by Mobil" in the following classifications: leadman, repairman, senior production operator, crane operator, production operator, utilityman and roustabout (*ibid.*). The contract established the wages to be paid by Santa Fe to employees in each classification, specified the several employee fringe benefits to be provided by Santa Fe, and permitted termination of the contract by either party on 30 days' notice (*ibid.*).

With regard to operational control, the contract provided, *inter alia*, that any personnel whose qualifications or performance were unsatisfactory to Mobil would be replaced, that crew change time and crew reporting time would be fixed periodically by Mobil, and that Mobil would provide transportation for platform employees to and from the work site (*ibid.*).

The ranking Santa Fe personnel on the platform were its two leadmen, who had at least nominal power to direct the work of the unit employees. Santa Fe's leadmen were subordinate to Mobil's two production foremen, at least one of whom was present on the platform at nearly all times, who actually directed the operation of the platform work. In practice, the leadmen served as conduits between Mobil's foremen and unit employees: they seldom gave other than routine directions without first clearing them with a production foreman, and their orders commonly were prefaced by comments indicating that they were being given at the express direction of one of the foremen. In most instances, the production foremen bypassed the leadmen altogether in dealing with the unit employees.

Mobil's production foremen possessed and exercised the authority to interview prospective unit employees and advise Santa Fe whom it should send to the platform. The foremen determined the classifications of those subsequently hired based on their interview and thereafter reclassified unit employees as circumstances dictated. Additionally, the foremen often discharged, demoted, and otherwise disciplined unit employees without consulting the leadmen. On a daily basis, the foremen also prepared and posted work schedules for the unit employees. With regard to the direction of the workforce in other than their assigned tasks, the foremen independently approved requests by employees for time off, authorized overtime, and periodically assigned unit employees to tasks at a Mobil facility, known as the tank farm, off the platform; and jointly with the leadmen, they approved promotions and vacations and verified employee's time slips. In this latter regard, the production foremen sometimes

directed the leadmen to alter and sometimes themselves altered time slips which they believed had been padded.

Mobil furnished employees with safety gear such as hard hats, hearing protectors, and safety goggles. At times the foremen held safety meetings and in other instances encouraged employees to comply with the posted safety regulations, some of which, such as the fire stations drawings, they had designed themselves. In addition to undertaking responsibility for compliance with O.S.H.A. regulations, the foremen also advised employees how to conduct and record pollution control tests required by the E.P.A. Mobil also furnished the employees with tools to be used on the platform.

During the fall of 1973, the union organized the employees on the platform.

At the representation hearing the union stipulated that Santa Fe was the employer and the Board's Regional Director so found. Although the union proposed a single unit for both the Granite Point Platform and another one operated by Marathon Oil Company, the Regional Director established a separate unit for the Granite Point group.

In January, 1974, the union was certified in Case No. 19-RC-6842 as a collective bargaining representative for,

> All employees employed by the employer on the Mobil Granite Point platform, excluding office and clerical employees, professional employees, guards and leadmen, relief leadmen and all other supervisors as defined by the Act.

After the union's certification as collective bargaining agent on January 31, 1974, the union began collective bargaining negotiations with Santa Fe Drilling Company. On February 4, 1974, which was a matter of

days after the certification, Santa Fe sent Mobil a letter asking that the daily mark up in the contract be increased.

Mobil replied by letter dated March 7th refusing to increase the mark up and withholding comment on the other portions of Santa Fe's letter. On March 22nd Mobil invited four companies plus Santa Fe to submit bids in contemplation of invoking the 30 day termination clause in the existing contract with Santa Fe. Santa Fe submitted a bid April 1st, the other four declined to bid.

Rather than accept Santa Fe's bid the employer permitted a belated bid from V.E. Construction, Inc. V.E. had not been included in the March 22nd bid invitation. V.E.'s bid submitted April 24th eventually was accepted.

On June 14th Mobil finally notified Santa Fe that its services were being terminated as of July 17th. The employer and V.E. executed a contract on July 12th calling for V.E. to begin July 17th. The contract was nearly identical in most respects to that between employer and Santa Fe including a 30 day termination clause. A conspicuous dissimilarity is the including in the V.E. contract of this language.

> V.E.'s status hereunder is that of an independent contractor and neither V.E. or any employees of V.E. are employees of Mobil. Mobil is interested only in and shall specify the results to be achieved in connection with the performance of the services under this contract in the manner, means and details of achieving such results in a good and workmen like manner are the responsibility of V.E.

Meanwhile Santa Fe and the union bargained collectively from March until May 29th when the employees struck in support of the union demands.

Thereafter, on June 26th, the Union's business agent, W. A. Hacklin, sent a letter to Lee Newton, Mobil's production superintendent in Anchorage, requesting that Mobil meet and negotiate with the Union. Mobil did not respond in writing, but on July 1st, its attorney, Risher Thornton, stated to Hacklin that Mobil would not bargain with the Union, and since that time, Mobil has not done so.

Subsequently, the unfair labor practice charge was filed by the union against the employer.

The case was tried before an administrative law judge who found that Mobil, as a joint employer with Santa Fe, had violated the Act as charged. Reinstatement of all employees and of the Santa Fe contract, plus full back pay, were ordered. Mobil appealed. The Board modified only the remedy by denying reinstatement and granting back pay from the date the Santa Fe contract was terminated until Mobil agreed to bargain with the union.

Mobil petitioned for review of the Board's decision, claiming *inter alia* that the union's June 26th request to bargain was untimely and that Mobil was not required to bargain as a joint employer. The union also petitioned for review, claiming that reinstatement should have been ordered. In response to both petitions, the Board cross-petitioned, seeking enforcement of its order. The two appeals were consolidated.

The Court considered the question of whether Mobil Oil Corporation could refuse to bargain with the union when it was neither afforded an opportunity to

participate in the certification proceedings nor requested by the union to bargain until after Mobil had terminated its contract with Santa Fe.

On June 14, 1977, the United States Court of Appeals for the Ninth Circuit issued an opinion granting Mobil Oil's Petition to Review in Case No. 75-3328, setting aside and denying enforcement of the Board's Order and dismissing the union's Petition for Review of said Order in Case No. 75-3049.

REASONS FOR GRANTING THE WRIT

The Court must grant a writ to review the Ninth Circuit Court of Appeals decision in this case for several reasons. The Court's decision is in direct conflict with other Circuit Courts of Appeals decisions in similar labor cases which include the cases of *N.L.R.B. v. Long Lake Lumber Company*, 138 F.2d 363 (9th Cir. 1943), *Ace-Alkire Freight Lines, Inc. v. N.L.R.B.*, 431 F.2d 280 (8th Cir. 1970), and *Royal Typewriter Company v. N.L.R.B.*, 533 F.2d 1030 (8th Cir. 1970). It is the petitioner's position that the Court's decision is in conflict with the other Courts of Appeals decisions because it misinterprets federal labor regulations and misapplies procedural due process to labor proceedings under the National Labor Relations Act and misperceives the relationship between representation proceedings under Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) and unfair labor practice hearings under Sections 8(a)(1) and (5) of the Act (29 U.S.C. 158(a)(1) and (5)). Because the decision conflicts with other federal court opinions on this same issue and because these opinions directly affect employer and union relationships in both representation proceedings and unfair labor practice proceedings, the

failure to review this decision and to rule on the issues involved in this case will disrupt labor relations throughout this country and will affect the outcome of countless labor cases.

The Court of Appeals stated on page 6 of its opinion, which is included at page 40a of the Appendix,

> The Board found that Mobil was a joint employer, primarily because of the control it exercised over Santa Fe's employees, but the extent of Mobil's control is not determinative of this appeal.

The Court continues by stating that because Mobil was not party to the representation hearing between the union and Santa Fe, that therefore it was denied due process by the Board's finding that it was a joint employer during an unfair labor practice hearing. This analysis misperceives the relationship between representation hearings and unfair labor practice hearings and is in direct conflict with other cases.

The above statement and the Court's analysis that follows directly conflict with the analysis in a number of other circuit court cases which have followed the Board's joint employer doctrine and have found that if an employer is found to exercise sufficient control over employees to be a joint employer and it has committed an unfair labor practice that the Board may find that it has violated the National Labor Relations Act and order appropriate remedies against it.

Other circuit courts have consistently ruled that the Board's determination in an unfair labor practice proceeding that an employer is a joint employer is solely for the purpose of remedying those unfair labor practices and such a determination is entirely separate from representation proceedings under Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)).

For example, the Court's decision in *N.L.R.B. v. Long Lake Lumber Company, supra*, 138 F.2d at 364, is very much on point. In *Long Lake Lumber Company* one employer, Robinson, was under contract to performed logging services for Long Lake at Long Lake's camp. After an organizational campaign, Robinson initially recognized and bargained for the union representing his employees. Immediately thereafter Long Lake ordered Robinson to shut the camp down, Robinson did so and the employer services were terminated. Robinson then refused to bargain further with the union at any time after the shutdown. The union filed charges against both Robinson and Long Lake alleging that the latter was a joint employer with Robinson. The Board found that Long Lake was a joint employer and ordered it *inter alia* to bargain with the union. In the enforcement proceeding against Long Lake, the Court found that the facts did show that Long Lake exercised such control over Robinson to warrant treatment as a joint employer and enforced the Board's bargaining order against it. Thus accordingly the determination of Santa Fe as the employer during the Board's certification of the union as the exclusive representative of Santa Fe's employees on the platform are not at issue here.

Also in *Royal Typewriter Company v. N.L.R.B.*, 533 F.2d 1030 (8th Cir. 1976), the Court arrived at a decision which largely conflicts with the lower court's decision in this case. In that case, the union had been certified in 1966 as the bargaining representative for the production and maintenance workers at the Springfield plant of Royal Typewriter Company. As the initial collective bargaining agreement between the union and Royal approached its expiration date, Royal questioned the union's continuing majority status, which led to a

series of conflicts culminating in the issuance of unfair practice complaints by the Board's General Counsel. The unfair practice proceeding investigated the corporate interrelationships of Royal, which is an unincorporated division of Litton Business Systems, which in turn is a wholly owned subsidiary of Litton Industries, Inc. An August, 1971, opinion by the administrative law judge held that Royal and L.B.S. were a single employer for the purposes of drawing up a remedy. Thereafter, in February, 1974, the Board granted the General Counsel's motion to add Litton Industries, Inc., as a respondent and remanded the case for further hearings on the issue of whether Litton, Royal, and L.B.S. were a single employer, and for the receipt of other evidence concerning Litton's participation in any unfair practices. The administrative law judge's ruling favored Litton, but was overturned by the Board, which held that the three entities were a single employer and that Litton had participated in the unfair practices in question. The Board's remedy ordered all three to accept responsibility for bargaining, and further required that preferential hiring procedures be adopted at Royal typewriter plants as well as at other Litton plants in and around Springfield.

Litton separately petitioned the Court of Appeals for review of the Board's single employer finding while also contending that the manner by which it was added as a party late in the proceedings denied it due process of law. The Court determined the issue as follows:

> While preserving a degree of operational autonomy within its divisions, it is clear that Litton reserved to itself a role in major expenditures, budget control, acquisitions, and plans, including any decision to close a plant. *Id.*, 92 LRRM 2013, at 2023.

The Court went on to say that:

> In assessing the appropriateness of single employer treatment, the fact that day to day labor matters are handled at a local level is not controlling . . . A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries and whether its course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective . . . We do not think that a conglomerate can act in negotiations as a single employer and then expect to avoid the consequences if unfair labor practice charges result from such conduct. . . .
>
> We come next to Litton's claim that its addition as a party to the unfair labor practice proceeding after all the evidence had been received denied it minimum due process . . . While we express some concern about the procedure under which the General Counsel deferred his effort to obtain Board approval to amend his complaint, we cannot say in the circumstances presented here that Litton has demonstrated that degree of prejudice which would warrant relief from this court. Due process, to be effective, must be afforded at a meaningful time and in a meaningful manner . . . The period of delay in this case is grounds for careful and sympathetic scrutiny of Litton's claims of prejudice. The totality of the circumstances, however, demonstrates that any prejudice resulted from Litton's failure to avail itself of the opportunity to reopen the case, confront the witnesses who had testified previously, and offer additional evidence of its own. . . .

The Board points out that the single employer

issue could have been reached in a supplemental contempt proceeding against LBS and Royal . . . and that the opportunity to participate accorded Litton in this case afforded at least as much due process as such a supplemental proceeding would have provided. This may overstate the case somewhat because the evidence adduced before Litton was joined as a party formed the principle basis for the Board's findings. On the other hand, the Board authorized the issue of Litton's involvement to be fully reopened; Litton sought no continuance, but simply refused to participate. Litton's attorney had been present when the evidence on the single employer issue was presented. There was no real surprise and Litton's refusal to participate was with knowledge of the evidence in the records.

> The record thus fails to demonstrate any prejudicial denial of due process. *Id.*, 2025.

Also see *N.L.R.B. v. Jewell Smokeless Coal Corp.*, 435 F.2d 1270 (4th Cir. 1970).

In both the *Long Lake Lumber* case, *supra*, and the *Royal Typewriter* case, the Courts have applied the joint employer doctrine used by the National Labor Relations Board to remedy unfair labor practices.

These Courts have consistently held that the findings of a representation hearing are not *res judicata* to a subsequent determination by the Board that Mobil was a joint employer. The matters determined at a representation hearing, which may include the Board's jurisdiction, appropriateness of the unit and sufficiency of the union showing for an election, and the fact that Santa Fe was found to be the employer, are in no way inconsistent with a subsequent determination in an unfair labor practice proceeding that Mobil exercised sufficient

control over the employees to be a joint employer. As the cases make clear, the fact that Mobil may qualify as an employer or a joint employer of the employees does not mean that Santa Fe is not an employer, but merely that both employers are subject to the enforcement of the Act.

The Courts have consistently held that where such control is exercised jointly by more than one employer, the Board is warranted in treating them for purposes of the Act as joint employers. *See Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964); *N.L.R.B. v. Greyhound Corp.*, 368 F.2d 778, 779-781 (5th Cir. 1966); *N.L.R.B. v. Long Lake Lumber Company*, 138 F.2d 363, 364 (9th Cir. 1943); *Ace-Alkire Freight Lines Inc. v. N.L.R.B.*, 431 F.2d 280, 282 (8th Cir. 1970).

It is clear from the testimony and the facts presented at the unfair labor practice hearing that Mobil was a joint employer with Santa Fe and that as such Mobil violated sections 8(a)(1) and (5) of the Act (29 U.S.C. 158(a)(1) and (5)) by refusing to bargain over the decision and effects of displacing unit employees.

If the status of a joint employer is not entertained at the certification stage, the later finding of a joint employer liability represents a remedy to combat potential manipulation of rights granted by the National Labor Relations Act. It is a culmination of an effort to look behind and beyond the certification investigation to determine largely different issues relating to the joint liability of corporations seeking to plot a course of labor relations outside the reach of the law. The weighing of constitutional due process on the one hand and the necessity of safeguarding rights granted by the N.L.R.A. on the other leads to a balancing of such interests such that joint employer status may be found

at an unfair labor practice proceeding which satisfies the due process requirements by providing the employer with a full and fair hearing before the complaint is decided. Where necessary to safeguard the statutory rights the Board may view separate legal entities as joint employers and order remedial action by a party exercising such control in a manner which violates the National Labor Relations Act.

The Court's decision in this case not only conflicts with other Courts' decisions in not applying the joint employer doctrine, but also in its analysis and concept of procedural due process in labor proceedings. It states that Mobil was denied due process because the National Labor Relations Board ordered it to remedy unfair labor practices although it was not a named employer during the earlier union certification proceedings. This analysis conflicts with other Court decisions and overlooks the nature of representation hearings conducted under Section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)).

The reason for the adoption of the Board's joint employer doctrine by these Courts and the noneffect of the results of the certification proceedings in relationship to the unfair labor practice proceedings is based upon the nature of the representation proceedings themselves. Section 9(c) of the National Labor Relations Act authorizes the N.L.R.B. to investigate controversies concerning the representation of employees. In providing that in any such investigation the Board shall give an opportunity or an appropriate hearing upon due notice, either in conjunction with an unfair labor practice proceeding or otherwise, the Act contemplates great latitude in procedural details and in the investigation which is essentially informal not

adversarial. *Inland Empire District Counsel Lumber and Sawmill Workers Union, Lewiston, Idaho v. Millis*, 325 U.S. 697 (1945).

In these proceedings the Board plays the part of a disinterested investigator merely seeking to ascertain the desires of the employees as to their representation. *N.L.R.B. v. Fresh'nd-Aire Company*, 226 F.2d 737 (7th Cir. 1955). This comports with the review taken by the Court in *American Cable and Radio Corp. v. Doud*, 111 F.Supp. 482, 485 (S.D.N.Y. 1953), as follows:

> In broad vein, a representation proceeding is not technical . . . The analogy between a representation hearing and a trial at law may not be pressed too far. 'The preliminary investigation and the hearing in a representation proceeding are not contentious litigation; not even litigation, but investigation. It is made on behalf of the Board by members of its staff. The outcome is merely a certification of a bargaining representative.' *N.L.R.B. v. Botany Worsted Mills*, 3rd Cir., 133 F.2d 876, 882. The issue which arises in the proceeding is the determination of which union, if any, the employees desire to represent them in collective bargaining with their employer. Since they are to choose their representative unhindered by the employer, he is at most a nominal party to the proceeding. *N.L.R.B. v. National Mineral Co.*, 7th Cir., 134 F.2d 424; *N.L.R.B. v. Whittier Mills Co.*, 5th Cir., 111 F.2d 474, 478. Of course, the employer has an obvious ultimate interest in who the collective bargaining representative is to be; and he may ultimately secure judicial review on the issue of whether the Board properly followed the proceeding required by legislation and whether there is substantial evidence to support its action. But it has no such immediate interest as to

> authorize its appearance, as a matter of right, clothed with all the armor of due process in contentious litigation, in an administrative investigatory proceeding held to determine the employee representative with whom it must bargain in good faith. In these circumstances, the claim of a denial of due process on the grounds advanced is utterly unpersuasive.

In representation hearings as shown above, there is no complete litigation. The National Labor Relations Board's views of the inappropriateness of these proceedings for the ultimate determination of joint employer issues is expressed in *Al J. Schneider*, 227 N.L.R.B. No. 191, wherein the Board dismissed a petition for unit clarification brought by an employer seeking a determination as to its joint employer status in advance of the disposition of 8(a)(5) refusal to bargain charges at the unfair labor practice stage. The flexible approach towards certification proceedings as noted in these cases, implies no estoppel except as to issues which were necessarily determined.

The Court's analysis of procedural due process in this action is also in direct conflict with the view taken by other circuit courts in applying procedural due process to labor relations actions.

According to *N.L.R.B. v. Ideal Laundry and Cleaning Company*, 330 F.2d 712 (10th Cir. 1964),

> The proceeding under Section 9(c) to determine the appropriate bargaining unit for purposes of certification, though conducted as a 'hearing upon due notice', is purely administrative and does not contemplate a final determination of the rights of the parties . . . The Board is entrusted with wide

> discretion in establishing the procedure and safeguards necessary to a free and fair choice of a bargaining representative by the employees . . . while the proof adduced at the Section 9(c) proceeding is carried forward as relevant evidence in an unfair labor practice hearing involving the appropriateness of the unit . . . it is not conclusive of the issue. *Id.*, 714-715.

The question that the Court should have analyzed as shown by the above cases, is whether Mobil was afforded a fair and full opportunity to be heard and to present evidence at the hearing before the administrative law judge. Clearly that opportunity was afforded to Mobil at the hearing before the administrative law judge.

The only basis for the Court's decision appears to be *N.L.R.B. v. Jordan Bus Company*, 380 F.2d 219 (10th Cir. 1967) and *N.L.R.B. v. Welcome-American Fertilizer Company*, 443 F.2d 19 (9th Cir. 1971).

However, these are cases in which the employer did not have an adequate opportunity to present evidence or prepare when issues of the joint employership were raised.

In *N.L.R.B. v. Jordan Bus Company, supra*, a representation proceeding where two employers were found by the Board to be a single employer for the purposes of jurisdiction, the Court found that one employer, Denco Bus Lines, was not given adequate notice of the hearing so that it could effectively participate, although the Court held that lack of notice had been cured. However, in the instant case, no such issue is present for Mobil was the sole party respondent in the unfair labor practice proceeding and was duly

served and notified of the hearing at which it participated.

Another case that the Court relies upon is *N.L.R.B. v. Welcome-American Fertilizer, supra.* However, this case applies the Board's single employer doctrine which is an administrative doctrine developed by the Board to insure that its jurisdictional standards are met where several nominally separate entities comprise an integrated enterprise which is in effect, a single employer having receipts in excess of the Board's minimal jurisdictional requisites. In this case, there was no need to establish jurisdiction via a joint employer theory at the certification proceedings. The due process arguments in these cases refer only to circumstances where an alleged joint employer has been named in the certification proceeding or the joint employer issue is in fact entertained at this stage.

The above analysis and comparison of the Circuit Courts of Appeals cases referred to in this action clearly demonstrate the compelling reason why the Court should issue a writ in this case. The Court's failure to apply the National Labor Relations Board's joint employer doctrine to remedy unfair labor practices and the Court's analysis and concept of the way in which procedural due process is to be applied in labor proceedings whether they be representation proceedings under section 9(c) of the National Labor Relations Act (29 U.S.C. 159(c)) or unfair labor practice proceedings under sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act (29 U.S.C. 158(a)(1) and (5)) depart from the majority of precedent and are in direct conflict with cases in other jurisdictions.

The effect of not reviewing this decision will cause total uncertainty in employer-union relationships across

this country and will directly affect the method in which employers and unions proceed during representation hearings and at unfair labor practice hearings.

It is the petitioner's position that this conflict is due to the misapplication of labor statutes, labor proceedings and National Labor Relations Board doctrines and that the decision allows those employers who may exercise direct control over employees to violate the National Labor Relations Act with impunity.

The failure to review this decision has more far reaching consequences as it will allow different results to occur in unfair labor practice proceedings where there has been a formal certification hearing for the union as a collective bargaining representative and where there has been an informal certification or a stipulated certification of the union.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

DATED this 23d day of December, 1977.

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APPENDIX

MJK

219 NLRB No. 91

D–45
Cook Inlet, Alaska

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD

MOBIL OIL CORPORATION
and
ALASKA ROUGHNECKS AND
DRILLERS ASSOCIATION

Case 19–CA–7181

DECISION AND ORDER

On February 6, 1975, Administrative Law Judge Richard J. Boyce issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief[1] and the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

For the reasons stated below, we agree with the Administrative Law Judge's conclusions that Respondent is a joint employer with Santa Fe Drilling Company of the

[1] Respondent's request for oral argument is hereby denied, as the record and the briefs adequately present the issues and positions of the parties.

employees employed on the Mobil Granite Point Platform and as such was obligated to bargain, upon request, with the Union about the decision and effects of displacing the unit employees. We also agree with his conclusion that Respondent violated Section 8(a)(1) when one of its production foremen, William Barlett, stated to unit employees that: (1) Respondent was not going to have a union contractor on the platform and instead would cancel its contract with Santa Fe and bring in a nonunion contractor; and (2) if there was a strike, the contract would be canceled and a nonunion contractor brought in.

We do not agree, however, with the Administrative Law Judge's conclusion that Respondent violated Section 8(a)(1) of the Act through a comment made by Production Foreman John Green, nor with his conclusion that V. E. Construction, Inc., is a joint employer with Respondent. Finally, the Administrative Law Judge's recommended remedy is modified in the manner described below.

1. The Administrative Law Judge's conclusion that Respondent and Santa Fe Drilling Company are joint employers is well supported by record evidence. In addition to the reasons offered by the Administrative Law Judge, we note several instances in which Respondent's production foremen exercised their authority to fire, promote, discipline, reassign, and reclassify unit employees. Indeed, even one of Santa Fe's own leadmen, Leonard Dunham, was promoted to this position by Mobil Production Foreman Barlett. As succinctly stated by the employees themselves, Respondent's production foremen are "the quarterbacks of the team" and the "captains of the ship." In view of this daily control exercised by Respondent's production foremen over the employees supplied by Santa Fe, we adopt the Administrative Law Judge's conclusion that Respondent is a joint employer with Santa Fe.[2]

2. We disagree, however, with the Administrative Law Judge's further conclusion that Respondent also is a joint employer with V. E. Construction, Inc. The contract which Respondent executed with V. E. Construction is similar to the contract which it theretofore had with Santa Fe with one major exception—V. E. Construction is specifically identified as an independent contractor and its employees are not to be considered as employees of Mobil. The Administrative Law Judge nevertheless concluded that "based upon the terms of its contract with V. E. Construction, and despite that contract's characterization of V. E. as an independent contractor, the Respondent and V. E. are joint employers for purposes of this proceeding."

Unlike the Administrative Law Judge, we find nothing in Respondent's contract with V. E. Construction which would negate that contract's establishment of V. E. Construction as an independent contractor. In addition, no evidence was introduced regarding the manner in which the Respondent-V. E. Construction contract was actually implemented. Accordingly, we do not know whether the substantial control which Respondent's production foremen exercised over the employees supplied by Santa Fe carried over to the employees supplied by V. E. Construction. In the absence of such evidence, we conclude that the Administrative Law Judge's finding that V. E. and Respondent are joint employers is not supported by the record.

3. A day or two after the union election on January 23, 1974, unit employee Burton DePriest initiated a casual

[2] Cf. *Hamburg Industries, Inc.*, 193 NLRB 67 (1971).

conversation with Production Foreman John Green. DePriest asked Green what he thought the possible consequences might be regarding the Union's recent victory. Green replied, "I imagine Mobil will put [the job] up for bid." The Administrative Law Judge found this reply violative of Section 8(a)(1) of the Act.

Contrary to the Administrative Law Judge, we find Green's simple response during a casual conversation with a single employee not to be a violation of Section 8(a)(1). The opinion espoused by Green was his own and was offered in reply to a question posed by DePriest. The casualness of the discussion is reflected in DePriest's own testimony:

> I just made an off-the-cuff-remark of—after it was found out that the election had already been held—I mean the election had already been held and the vote was 10 to 1, I believe it was. And I said, I wonder what will happen now? And his remark was I imagine Mobil will put this up for bid.

Considering the casualness of the particular conversation, the fact that only a single employee heard it, and the apparent camaraderie of the men working on the platform derived from their close quarters and long working hours,[3] we conclude that Green's reply to DePriest's inquiry did not violate Section 8(a)(1) of the Act.

4. In his recommended remedy, the Administrative Law Judge directed that:

> . . . Respondent be ordered fully to restore the *status quo ante* by reviving its relationship with Santa Fe on the Granite Point Platform and in so doing offer reinstatement to the unlawfully displaced employees and make them whole for their

[3] Unit employees work shifts of 10 days on and 5 days off.

> monetary losses, from the July 17 date that V. E. Construction supplanted Santa Fe, occasioned by their displacement. It is further recommended, should Respondent *then* wish to replace Santa Fe, that it be required first to bargain with the Union over the decision and its effects on the employees subject to displacement.

In our view, the recommended remedial order is excessively broad in scope. We agree that Respondent, as a joint employer, is obligated to bargain with the Union over the decision and effects of displacing the unit employees. We also agree that since Respondent failed to satisfy this obligation, backpay measured from the date that V. E. Construction, Inc., supplanted Santa Fe is likewise appropriate. We do not agree, however, that reinstatement of the displaced employees and reinstitution of the Santa Fe contract is either necessary or warranted.

As noted by the Administrative Law Judge Respondent's contract with Santa Fe gave Respondent the privilege of termination upon 30 days' notice. Accordingly, neither the contract termination nor the actual displacement of unit employees occasioned thereby is alleged as a violation of the Act. In addition, neither Santa Fe nor V. E. Construction, Inc., are parties to this proceeding.

Adoption of the Administrative Law Judge's recommendations, therefore, would require reinstitution of a legitimately terminated contract with an organization (Santa Fe) which is not a party to this proceeding and which has not been represented herein. Simultaneously, we would be abrogating Respondent's existing agreement with V. E. Construction, Inc., another organization not named as a party. In our judgment, it is unnecessary to tamper with the legal relationships of Santa Fe and V. E. Construction, Inc., since the bargaining order and back-

pay which we are directing is sufficient to remedy the violations which have been committed.

Accordingly, in order to effectuate the purposes of the Act, we shall require Respondent to bargain with the Union concerning the decision and effects of displacing the unit employees and shall accompany our order with backpay designed to make whole the employees for losses suffered. Thus, we shall order backpay computed in the manner recommended by the Administrative Law Judge for all displaced unit employees from July 17, 1974, until the occurrence of the earliest of the following conditions: (1) the date Respondent bargains to agreement with the Union on those subjects pertaining to the decision and effects of the displacement of unit employees; (2) a *bona fide* impasse in bargaining; (3) the failure of the Union to request bargaining within 5 days of Respondent's notice of its desire to bargain with the Union; or (4) the subsequent failure of the Union to bargain in good faith.[4]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its order the recommended order of the Administrative Law Judge as modified below and hereby orders that Respondent, Mobil Oil Corporation, Cook Inlet, Alaska, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended order, as so modified:

1. Substitute the following for paragraph I,C:

"C. In any other manner interfering with, restraining,

---

[4] *Jack L. Williams, D.D.S., d/b/a Empire Dental Co.*, 211 NLRB No. 127 (1974).

or coercing employees in the exercise of the rights under Section 7 of the Act.

2. Substitute the following for paragraph II,A:

"A. Give the displaced employees backpay for the period set forth in this Decision."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. Jul. 25, 1975

Betty Southard Murphy,	Chairman
Howard Jenkins, Jr.,	Member
Ralph E. Kennedy,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had an opportunity to present their evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act, and has ordered us to post this notice and comply with its provisions.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves

To form, join, or support unions

To bargain as a group through a representative they choose

To act together for collective bargaining or other mutual aid or protection

To refrain from any or all such activities.

In recognition of these rights, we hereby notify our employees that:

WE WILL NOT state to employees that we will cancel our contract with Santa Fe Drilling Company, or with any other employer, rather than have a union contractor on the Granite Point Platform, or should the employees go on strike.

WE WILL NOT refuse to bargain collectively with Alaska Roughnecks and Drillers Association as the exclusive bargaining representative of the employees in the bargaining unit set forth below by contracting out the work of those employees or otherwise changing their wages, hours, and other terms and conditions of employment without first bargaining with the above labor organization. The appropriate unit is:

All employees of the Employer on the Mobil Granite Point Platform excluding office clerical employees, professional employees, guards, and leadmen, relief leadmen and all other supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise

of the rights guaranteed to them under Section 7 of the Act.

WE WILL give those employees displaced by our termination of the contract with Santa Fe backpay in accordance with the remedial order set forth in the Board's Decision.

WE WILL bargain collectively with Alaska Roughnecks and Drillers Association as the exclusive representative of our employees in the unit above with respect to wages, hours, and other terms and conditions of employment.

MOBIL OIL CORPORATION
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2948 Federal Building, 915 Second Avenue, Seattle, Washington 98101, Telephone 206–442–4532.

JD-(SF)-14-75
Cook Inlet, Alaska

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

MOBIL OIL CORPORATION
and
ALASKA ROUGHNECKS AND
DRILLERS ASSOCIATION

19–CA–7181

Jerome Rubin, Esq., of Seattle, Wash., for the General Counsel.
Risher M. Thornton, Esq., of Anchorage, Alaska, for the Respondent.
Thomas C. McClellan, Esq., of Dallas, Texas, for the Respondent.
Jack T. Akin, Esq., of Denver, Colo., for the Respondent.
William K. Jermain, Esq. and *Suzanne Pestinger, Atty.*, of Anchorage, Alaska, for the Charging Party.

DECISION

I. Statement of the Case

RICHARD J. BOYCE, Administrative Law Judge: This case was tried before me in Anchorage, Alaska, on December 19 and 20, 1974. The charge was filed July 5, 1974, by Alaska Roughnecks and Drillers Association (herein called the Union). The complaint issued October 31, was amended in minor respects at the outset of the trial, and alleges that Mobil Oil Corporation (herein called Respondent or Mobil) has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

The parties were given opportunity at the trial to introduce relevant evidence, examine and cross-examine witnesses, and argue orally. Briefs were filed for the General Counsel and Respondent.

II. Issues

The issues are whether Respondent:

1. Violated Section 8(a)(5) [and (1)] when, in July 1974, it replaced Santa Fe Drilling Company (herein called Santa Fe) as contractor of labor on Respondent's Granite Point Platform without giving the Union a chance to bargain over the decision and its effects on the displaced employees (herein sometimes called the unit employees), whom the Union represented.

2. By its officials, in early 1974, informed unit employees that it would terminate the contract by which Santa Fe provided labor for the Granite Point Platform if those employees persisted in supporting the Union; violating Section 8(a)(1).

III. Jurisdiction

Respondent is a Delaware corporation engaged in several states of the United States, including Alaska, in the production and distribution of petroleum products. Its annual gross income exceeds $500,000, and it annually causes products of a value exceeding $50,000 to be shipped across state lines.

Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

IV. Labor Organization

The Union is a labor organization within Section 2(5) of the Act.

V. The Alleged Violation of Section 8(a)(5)

A. Facts

Background. Respondent owns 75 percent interest in the Granite Point Platform, which is situated offshore in Cook Inlet, Alaska.[1] The remaining 25 percent is owned by Union Oil Corporation. Respondent is the "operator" of the platform, meaning that, between it and Union Oil, it is responsible for the platform's functioning. The platform was installed in 1966. Its first two or so years were devoted to drilling for oil, since when it has been concerned mainly with production.

In both the drilling and production phases, until supplanted in July 1974 as detailed below, Santa Fe was under contract with Respondent to furnish labor for the platform. The complement furnished by Santa Fe during the drilling phase was about 100 employees; during the production phase, about 13. On January 31, 1974, following an NLRB election in Case No. 19-RC-6842, the Union was certified to represent this unit of platform employees:

> All employees employed by the Employer on the Mobil Granite Point Platform excluding office clerical employees, professional employees, guards, and leadmen, relief leadmen and all other supervisors as defined in the Act.[2]

[1] Respondent's investment in the platform in about $50,000,000.

[2] It is concluded that this is an appropriate unit within Section 9(b) of the Act.

Santa Fe was a named party to that proceeding; Respondent was not.

Respondent's Relationship with Santa Fe. Under its latest contract with Respondent, which became effective June 1, 1972, Santa Fe was obligated to furnish employees "as required by Mobil" in these classifications: leadman, repairman, senior production operator, crane operator, production operator, utility-man, and roustabout. The contract set forth the wages to be paid by Santa Fe to employees in each classification, named the several employee fringe benefits to be given by Santa Fe,[3] and permitted termination of the contract by either party on 30 days' notice.

Among other provisions of the contract were these:

1. Wage rates "shall be renegotiable at such times as contractor's [Santa Fe's] labor pay scales are changed as a result of general industry pay scale change."

2. "[A]ny personnel whose qualifications or performance are unsatisfactory to Mobil will be promptly replaced by Santa Fe."

3. "Crew change time and crew reporting time . . . will be designated periodically by Mobil."

4. "Mobil shall have the option to hire any Santa Fe employees furnished hereunder."

5. "Mobil shall provide transportation for Santa Fe employees . . . to work site and return."

The contract provided that, in consideration for Santa Fe's services, Respondent make it whole for its wage outlay, and in addition pay it a fixed amount or "mark-up"

[3] Including paid vacations, a profit-sharing and retirement plan, a stock bonus plan, safety awards, and workmen's compensation insurance.

per employee per day to cover its fringe benefit and overhead expenses and allow for profit.

The ranking Santa Fe personnel on the platform were its two leadmen. They had nominal power to hire and fire and meaningfully direct the work of the bargaining unit employees.[4] Santa Fe's leadmen in turn were subordinate to Respondent's two production foremen, at least one of whom was present on the platform at nearly all times. The leadmen in many ways were conduits between the production foremen and the unit employees. They seldom gave other than routine direction without first clearing with a production foreman; and their orders commonly were prefaced by comments indicating that they were being given on the say-so of one of the production foremen. The production foremen often bypassed the leadmen altogether in dealing with the unit employees.

Further indicative but not exhaustive of Respondent's control, the production foremen regularly interviewed prospective unit employees and advised whom Santa Fe should send to the platform;[5] determined the classifications of those subsequently hired based on interview impressions; reclassified unit employees as circumstances dictated; prepared and posted work schedules for the unit employees; sometimes discharged, demoted, and otherwise disciplined unit employees without consulting with the leadmen; independently approved requests by unit employees for time off; authorized overtime for unit employees and assigned them to tasks at a Mobil facility (the

[4]The leadmen were ruled ineligible to vote in the NLRB election on supervisory grounds.

[5]As William Barlett, Respondent's senior production foreman on the platform, testified: "I don't believe that they [Santa Fe's personnel managers] were really well versed in the needs of the platform."

Tank Farm) off the platform; and, jointly with the leadmen, approved promotions and vacations for unit employees and verified their time slips. In this latter regard, the production foremen sometimes directed the leadman to alter and sometimes themselves altered time slips which they believed had been padded.

The Replacement of Santa Fe. On February 4, 1974, which was a matter of days after the Union received NLRB certification to represent the unit employees, Santa Fe sent Respondent a letter asking that the daily mark-up in their contract be increased, and further stating:

> In the foreseeable future Santa Fe expects to begin [collective-bargaining] negotiations that could eventually result in changes in both the basic hourly wages and benefit package earned by our employees working on the Granite Point Platform. In such event we would, once this negotiation is finalized, be requesting a further alteration in the agreed upon hourly rates billed to Mobil for the services rendered and an adjustment in the "mark-up" to cover any such new benefit and overhead package. In addition there may well be some retroactive pay increases granted as part of the negotiations which we would expect Mobil to pay for.

Respondent replied by letter dated March 7, refusing to increase the mark-up and withholding comment on the above-quoted portion of the Santa Fe letter. Respondent further responded, in the words of J. L. White, its production manager for Alaska, by electing "to canvass the market and find out whether or not this was as good an offer as I could get to operate the platform with respect to this mark-up." Accordingly, Respondent on March 22 invited four companies, plus Santa Fe, to submit bids in contemplation of invoking the 30-day termination clause

in the existing contract with Santa Fe. Santa Fe submitted a bid April 1. The other four declined to bid.

Rather than accept Santa Fe's bid,[6] in which Santa Fe had acknowledged that, "as a result of our present negotiations" with the Union, certain cost items could not be firmly quoted, Respondent permitted a belated bid from V. E. Construction, Inc. V. E. had not been included in the March 22 bid invitation. V.E.'s bid, submitted April 24, eventually was accepted. Respondent calculated that it would be more favorable than Santa Fe's by from $20,000-$50,000 per year. On June 14, Respondent formally notified Santa Fe that its services were being terminated as of July 17. Respondent and V. E. executed a contract on July 12, calling for V. E. to begin July 17. This contract is nearly identical in most respects to that between Respondent and Santa Fe, including a 30-day termination clause. A conspicuous dissimilarity is the inclusion in the V. E. contract of this language:

> V. E.'s status hereunder is that of an independent contractor and neither V. E. nor any employees of V. E. are employees of Mobil. . . . Mobil is interested only in and shall specify the results to be achieved in connection with the performance of the services under this contract, and the manner, means and details of achieving such results in a good and workmanlike manner are the responsibility of V. E.

Meanwhile, Santa Fe and the Union bargained collectively from March until May 29, when the employees struck in support of the Union's demands.[7] There is no

[6]The bid invitation reserved to Respondent "the right to reject any and all bids."

[7]The strike continued beyond V.E.'s replacement of Santa Fe. Respondent manned the platform with its own personnel until V.E. began to perform. There is no evidence that the strikers applied for reinstatement.

evidence that Respondent played either an overt or a covert role in those negotiations.[8] On June 21, as a result of Respondent's June 14 termination notice to Santa Fe, John C. Kilroy, one of Santa Fe's negotiators, sent this letter to the Union:

> Mobil Oil Company has notified us that our contract to provide labor and service has been cancelled pursuant to the terms of the contract. Therefore our last day for this Company to provide labor for the Mobil Granite Point Platform will be July 17, 1974.
>
> Because of this, we do not see how we are able to continue operations there; however, we are willing to bargain about both of these matters with you. Of course, if we are able to resume operations (Mobil Granite Point Platform) within the N.L.R.B. certification year, we will certainly give you notice and bargain with you with respect to any relevant matters.
>
> If you have any questions concerning the contents of this letter, please feel free to contact me. [9]

Consequently, on June 26, the Union's business agent, W. A. Hacklin, sent this letter to Lee Newton, Respondent's production superintendent in Anchorage:

[8]W.A. Hacklin, the Union's business agent, testified, however, that one of Santa Fe's negotiators, John C. Kilroy, stated during bargaining that Respondent had the option of getting rid of Santa Fe if it did not approve of the bargaining outcome.

[9]Also on June 21, Santa Fe sent a letter to Respondent acknowledging receipt of the termination notice and adding:

> While agreeing that Mobil is within their contractual right by giving us the required thirty (30) day contract cancellation notice, Santa Fe is disappointed that Mobil elected to cancel our Granite Point Labor Agreement after a tenure of almost eight years.

> It has come to my attention that effective July 17, 1974 Mobil Oil Company will terminate the services of Santa Fe Drilling Company. It is my further understanding that Mobil Oil Company will perform the services previously performed by Santa Fe. Accordingly, since you are a successor employer of Santa Fe Drilling Company, we hereby request that you meet and negotiate with us for the purposes of entering into a Collective Bargaining Agreement.
>
> Please respond to our request within ten (10) days of the date of this letter.

Respondent did not respond in writing, but on July 1 its attorney, Risher Thornton, told Hacklin by telephone that Respondent would not bargain with the Union.

As earlier mentioned, the Union filed its charge against Respondent on July 5.

B. Analysis and Conclusions

Contentions. The General Counsel contends that Respondent violated Section 8(a)(5) by displacing the unit employees on the Granite Point Platform without giving the Union a chance to bargain over the decision or its effects on those employees. This contention is premised on the assumption that Respondent and Santa Fe were joint employers of the unit employees; therefore, that Respondent shared Santa Fe's bargaining obligation to the Union.[10] Respondent takes an opposing position on all counts.

---

[10]There is no contention that Respondent, by terminating the Santa Fe contract during the strike, in effect discharged strikers in violation of Section 8(a)(3); nor is it contended, despite the Section 8(a)(1) statements considered later in this decision, that Respondent otherwise violated Section 8(a)(3) by displacing unit employees.

The Joint-Employer Issue. Respondent and Santa Fe plainly were joint employers of the unit employees. That Respondent possessed the requisite control over those employees is best shown by the contract between it and Santa Fe, which, as previously mentioned, empowered Respondent, among other things, to (a) dictate the size of the Santa Fe crew, (b) compel the replacement by Santa Fe of "any personnel whose qualifications or performance are unsatisfactory to Mobil," (c) designate "crew change time and crew reporting time," (d) hire any of the Santa Fe crew, and (e) terminate the contract at will, the only limitation being 30 days' notice. The contract required, in addition, that wage-rate changes proposed by Santa Fe be negotiated with Respondent.

In practice, moreover, Respondent's control over Santa Fe and the unit employees went beyond the letter of the contract. Again as earlier noted, Respondent's production foremen (a) intruded themselves in Santa Fe's hiring process to the extent of interviewing prospective platform employees and advising Santa Fe which of them to send to the platform, (b) classified and reclassified the unit employees, (c) prepared and posted work schedules, (d) sometimes discharged, demoted, and otherwise disciplined unit employees, (e) authorized time off for unit employees, (f) authorized overtime for unit employees and assigned them to tasks at a Mobil facility away from the platform, (g) jointly with Santa Fe's leadmen approved promotions and vacations for unit employees and verified their time slips, and (h) often bypassed the Santa Fe leadmen when issuing orders to the crew.

A fine-combing of the record would reveal yet other indicia of Respondent's control, but the point is abundantly made by the foregoing aggregate of factors that

Respondent and Santa Fe were joint employers.[11] It also is concluded, based upon the terms of its contract with V. E. Construction, and despite that contract's characterization of V. E. as an independent contractor, the Respondent and V. C. [*sic*] are joint employers for purposes of this proceeding. See, e.g., *Ref-Chem Company*, 169 NLRB 376, 377, 379.

The Bargaining Implications of Joint-Employership. The law seems settled, at least so far as the Board is concerned, that Respondent, as joint employer with Santa Fe of the unit employees, had an obligation coequal with Santa Fe's to recognize and bargain with the lawful bargaining representative of those employees. *Ref-Chem Company, supra,* at 380.[12] The nature of the joint-employer relationship is such that it is of no moment that the Union's status derived from Board representation proceedings in which Respondent was not a named party, as opposed, say, to a voluntary grant of recognition by Santa Fe. "As joint employers," to quote from *Ref-Chem Company* at 380, "each is responsible for the conduct of the other."

The Duty to Bargain Over Displacement of Unit Employees. Relevant to the present case are *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964), and the copious body of case law that has arisen from it. *Fibreboard* involved an employer's contracting out of in-

[11] A main argument of Respondent's is that joint-employership cannot be found to exist because Respondent has severed its relationship with Santa Fe. This of course begs the ultimate question in the case.

[12] Enforcement denied, 418 F.2d 127 (5th Cir. 1969). The Fifth Circuit, however, expressly withheld judgment on "the use of the joint employer doctrine to pass the obligation to bargain from one employer to another . . . ." 418 F.2d at 129.

plant maintenance work, and the attendant discharge of its maintenance employees, without first permitting the employees' bargaining representative to discuss the matter. The reasons for the change were validly economic and free of antiunion taint. The Court held that "the replacement of employees in the existing unit with those of an independent contractor to do the same work" was a mandatory subject of bargaining under Section 8(a)(5) and 8(d) of the Act, explaining (379 U.S. at 214):

> [I]t is contended that when an employer can effect cost savings . . . by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation . . . . [I]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly.

Further to this point, and responsive to the concern stated in Respondent's brief that "if bargaining was required prior to cancellation, the union would never agree to the termination of all its employees . . . [and] . . . it would seem to follow that the contract could never be cancelled," the Board observed in *Ozark Trailers, Inc.*, 161 NLRB 561, 568:

> [A]n employer's obligation to bargain does not include the obligation to agree, but solely to engage

> in a full and frank discussion with the collective-bargaining representative in which a bona fide effort will be made to explore possible alternatives, if any, that may achieve a mutually satisfactory accommodation of the interests of both the employer and the employees. If such efforts fail, the employer is wholly free to make and effectuate his decision. Hence, to compel an employer to bargain is not to deprive him of the freedom to manage his business.[13]

Implicit in *Fibreboard*, however, is the qualification that a contracting-our [sic] decision attended by considerations not "suitable for resolution within the collective bargaining framework" need not be subjected to bargaining ritual. 379 U.S. at 213-14. The board, following this lead, repeatedly has stated that it does not read *Fibreboard* "as laying down a hard and fast new rule to be mechanically applied regardless of the situation involved." *Sucesion Mario Mercado E Hijos*, 161 NLRB 696, 700; *Westinghouse Electric Corp.*, 150 NLRB 1574, 1576; *Shell Oil Co.*, 149 NLRB 305, 307. The Board thus has refused to find a violation where "it seems certain that no amount of give-and-take in bargaining negotiations could have forestalled the Respondent's inevitable decision" (*Sucesion Mario Mercado E Hijos, supra*, at 161 NLRB 700); or where the decision involved such "a

[13] Or, as stated in *The University of Chicago*, 210 NLRB No. 19, slip op. 3:

> It is well established that an employer may, *after the necessary bargaining*, terminate work done by the union's members at a particular location and subcontract it, transfer it elsewhere, or introduce different methods of operation at the same location, even though such action . . . results in the elimination or reduction in size of the unit involved. [Emphasis added.]

significant investment or withdrawal of capital [affecting] the scope and ultimate direction of an enterprise" as to "lie at the very core of entrepreneurial control." *General Motors Corp.*, 191 NLRB 951, 952.

Even when an employer's unilateral subcontracting decision is prompted by considerations "suitable for resolution within the collective bargaining framework," Section 8(a)(5) is not necessarily violated. The Board in *Westinghouse Electric Corp., supra,* set forth several criteria, which if met more or less cumulatively nevertheless warrant complaint dismissal. They are if the contracting out was motivated solely by economic considerations, comported with the employer's traditional business operations and established past practice, did not have demonstrable adverse impact on the unit employees, and the union had had opportunity in previous negotiation to bargain about the employer's subcontracting practices. See also, *Tellepsen Petro-Chem Constructors*, 190 NLRB 433, fn. 1.

Whether an employer's subcontracting decision is of a nature entitling the union first to bargain—i.e., whether it is a mandatory subject of bargaining—turns, then, on the considerations attending that decision. If they were "suitable for resolution within the collective bargaining framework," the union is entitled unless the exonerating criteria of *Westinghouse Electric Corp.* are met. If, on the other hand, those considerations were "at the very core of entrepreneurial control" or otherwise such "that no amount of give-and-take in bargaining negotiations could have forestalled the . . . inevitable decision," the union is not entitled to bargain over the decision itself. But even where the union is not entitled to bargain over the underlying decision, the employer generally must give it a chance to bargain over the effects of the decision—i.e.,

"an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision." *Ozark Trailers, Inc., supra,* at 161 NLRB 563, quoting from *NLRB* v. *Royal Plating and Polishing Co.*, 350 F.2d 191, 196 (3rd Cir. 1965). See also, *Summit Tooling Co.*, 195 NLRB 479.

Applying these principles to the present case, it must be concluded that Respondent was under a duty to bargain over the effects on the unit employees of its decision to replace them, whether or not under a duty to bargain over the decision proper. *Summit Tooling Co., supra; Ozark Trailers, Inc., supra.*

It is further concluded, in the circumstances at hand, that Respondent was under a similar duty concerning the decision itself. The saving *Westinghouse* criteria do not obtain because of the harshly adverse impact of the decision on the unit employees, the absence of precedent-setting past practice, and the Union's lack of prior opportunity to bargain over Respondent's contracting-out practices. It is plain, furthermore, that the decision was triggered by the anticipated increased costs of continuing the relationship with Santa Fe, costs which necessarily were a function, at least in part, of employee wage and benefit levels—matters at once remote from the core of entrepreneurial control and uniquely appropriate for treatment within the bargaining framework.

Respondent being under a duty to permit the Union to bargain not only over the effects of its decision to displace the unit employees, but the decision as well, it follows that its failure to do so and its rejection of the Union's request to bargain violated Section 8(a)(5) [and (1)] of the Act.

VI. The Alleged Independent Violations of Section 8(a)(1)

A. Facts

The NLRB election was held January 23, 1974. A day or two later, one of the unit employees, Burton DePriest, conversed with John Green, one of Respondent's production foremen, about the election. DePriest said he wondered what would happen now that the Union had won, to which Green replied: "I imagine Mobil will put this up for bid."[14]

At about the same time, Respondent's other production foreman, William Barlett, stated in the presence of Santa Fe Leadman Leonard Dunham and unit employees William Gray and Billy Mack Nichols that Respondent was not going to have a union contractor on the platform, and instead would cancel its contract with Santa Fe and bring in a non-union contractor. Then in May, with the strike in prospect, Barlett stated to Dunham and unit employee Glen Cowden that, if there were a strike, Respondent would cancel Santa Fe's contract and bring in a nonunion contractor.

Barlett, in his testimony, admitted the substance of the statements attributed to him. As he put it: "Very likely I did raise these options . . . [that, if there were a strike] . . . we could shut down . . . [or] . . . we could replace them with one of the nonunion contractors." Barlett added: "I'm sure that everyone was aware that I was not speaking for Mobil, and that it was my opinion."

B. Conclusions

Green and Barlett, as Respondent's production fore-

[14]This is based on DePriest's uncontroverted testimony. Green did not testify.

men, were agents of Respondent and supervisors of the platform employees previously found to have been jointly employed by Respondent and Santa Fe. The one comment by Green and the two by Barlett set forth above, whether given as opinions or pronouncements from Olympus, necessarily would have tended to interfere with, restrain, and coerce the employees who heard them, violating Section 8(a)(1).[15]

VII. Conclusions of Law

A. Respondent is an employer engaged in and affecting commerce within Section 2(2), (6), and (7) of the Act.

B. The Union is a labor organization within Section 2(5) of the Act.

C. The employees in the bargaining unit described in the certification of representative in Case No. 19-RC-6842 constitute a unit appropriate for collective bargaining within Section 9(b) of the Act.

D. Respondent and Santa Fe Drilling Company are the joint employers of the employees in the above unit.

E. The Union at all material times has been the exclusive collective bargaining representative of the employees in the above unit within Section 9(a) of the Act.

F. By terminating its contract with Santa Fe and thereby displacing the employees in the above unit, without permitting the Union to bargain over the underlying decision or its effects on those employees, as found herein,

[15]Since none of the comments in question was spoken to Leadman Dunham out of earshot of persons who indisputably were employees under the Act, it is unnecessary to decide as the General Counsel urges, that Dunham was an employee rather than a statutory supervisor.

Respondent engaged in unfair labor practices within Section 8(a)(5) [and (1)] of the Act.

G. By the utterances of Production Foremen Green and Barlett described herein, Respondent engaged in unfair labor practices within Section 8(a)(1) of the Act.

H. The aforesaid unfair labor practices affect commerce within Section 2(6) and (7) of the Act.

VIII. Remedy

To effectuate the policies of the Act, it is recommended that Respondent be ordered to cease and desist from the unfair labor practices found.

Affirmatively, despite the difficulties inherent in "unscrambling the egg" in cases of this sort, it is recommended that Respondent be ordered fully to restore the *status quo ante* by reviving its relationship with Santa Fe on the Granite Point Platform and in so doing offer reinstatement to the unlawfully displaced employees and make them whole for their monetary losses, from the July 17 date that V. E. Construction supplanted Santa Fe, occasioned by their displacement. It is further recommended, should Respondent *then* wish to replace Santa Fe, that it be required first to bargain with the Union over the decision and its effects on the employees subject to displacement.

The inclusion in this recommendation of the backpay and reinstatement elements is not without awareness that the employees in question were on strike when their unlawful displacement occurred, and of the Board policy stated in *Astro Electronics, Inc.*, 188 NLRB 572, 573:

> It is the settled policy of the Board that striking employees are not entitled to backpay while they are on strike. Their rights depend on the termination of the strike which is ordinarily signified by

> the strikers' application for reinstatement. Employees who are discharged while on strike [which in effect happened to the employees in question] also must indicate abandonment of the strike and a willingness to return to work in order to establish their right to their jobs and resumption of wages *unless there is a showing that such application would be rejected, i.e., that it would have been futile.* [Emphasis added.][16]

Rather, it is concluded that Respondent's additional act of contracting out the work to V. E., after earlier terminating the Santa Fe contract, made application for reinstatement by the strikers so palpably futile as to satisfy the exception—emphasized in the above passage—to the general rule.

Nor is this recommendation unmindful that its implementation would involve the Board in a reengineering of Respondent's contractual relationships with two entities who are not named parties herein, Santa Fe and V. E. Santa Fe and V. E. both being joint employers of Respondent for purposes of this proceeding, however, such involvement plainly would not exceed the Board's remedial powers; and, in all the circumstances, is essential to the achievement of a meaningful remedy.[17]

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[16]See also *Valley Oil Co.*, 210 NLRB No. 47, slip op. 2; *Royal Typewriter Company*, 209 NLRB No. 174, slip. op. 30; *Sea-Way Distributing, Inc.*, 143 NLRB 460; *Happ Brothers Company*, 90 NLRB 1513, 1518-19.

[17]The Supreme Court expressly considered and approved a remedy of comparable scope in *Fibreboard*, 379 U.S. at 215-16. The Board in special circumstances, however, imposed gentler sanctions. For instance in *Empire Dental Co.*, 211 NLRB No. 127; *Ozark Trailers, Inc., supra; Royal Plating and Polishing Co.*, 148 NLRB 545; and *Renton News Record*, 136 NLRB 1294, it did not order resumption of the discontinued operations because inter-

[footnote continued]

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

* * * * * * * * * *

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[18]

ORDER

Respondent, Mobil Oil Corporation, its officers, agents, successors, and assigns, shall:

I. Cease and desist from:

A. Stating to employees that it would cancel its contract with Santa Fe Drilling Company, or with any other employer, rather than have a union contractor on the Granite Point Platform, or should the employees go on strike.

B. Refusing to bargain collectively with Alaska Roughnecks and Drillers Association as the exclusive bargaining representative of the employees in the bargaining

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vening events or other extenuating factors made resumption seriously burdensome.

Similarly, the Board in those cases relaxed or eliminated the backpay aspect of the remedy. The present case, unlike those, is not one in which the policies of the Act would be served by a softened remedy.

[18]All outstanding motions inconsistent with this recommended Order hereby are denied. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

unit set forth in the certification of representative issued by the NLRB in Case No. 19-RC-6842; and from contracting out the work of those employees or otherwise changing their wages, hours, and other terms and conditions of employment without first bargaining with the above labor organization.

C. In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights under Section 7 of the Act.

II. Take the following affirmative action:

A. Revive its contractual relationship with Santa Fe Drilling Company on the Granite Point Platform; and, in so doing, offer reinstatement to those employees displaced by its termination of the contract with Santa Fe, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay and other benefits suffered by them on and after July 17, 1974.

B. Bargain collectively with Alaska Roughnecks and Drillers Association as the exclusive representative of the employees in the aforementioned unit with respect to wages, hours, and other terms and conditions of employment.

C. Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the rights of reinstatement under the terms of this Order.

D. Post on the Granite Point Platform and its office in Anchorage, Alaska, copies of the attached notice

marked "Appendix."[19] Copies of said notice on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

E. Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated: 6 February 1975

Richard J. Boyce
Administrative Law Judge

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[19]In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD. [sic]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED
STATES GOVERNMENT

The trial held in Anchorage, Alaska, on December 19 and 20, 1974, in which we participated and had a chance to give evidence, resulted in a decision that we had committed certain unfair labor practices in violation of Section 8(a)(1) and (5) of the National Labor Relations Act, and this notice is posted pursuant to that decision.

The National Labor Relations Act, as amended, gives all employees the following rights:

To organize themselves
To form, join or support unions
To bargain as a group through a representative they choose
To act together for collective bargaining or other mutual aid or protection
To refrain from any or all such activities.

In recognition to these rights, we hereby notify our employees that:

WE WILL NOT state to employees that we will cancel our contract with Santa Fe Drilling Company, or with any other employer, rather than have a union contractor on the Granite Point Platform, or should the employees go on strike.

WE WILL NOT refuse to bargain collectively with Alaska Roughnecks and Drillers Association as the exclusive bar-

gaining representative of the employees in the bargaining unit set forth in the certification of representative issued by the NLRB in Case No. 19-RC-6842; and WE WILL NOT contract out the work of those employees or otherwise change their wages, hours, and other terms and conditions of employment without first bargaining with the above labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights under Section 7 of the Act.

WE WILL revive our contractual relationship with Santa Fe Drilling Company on the Granite Point Platform; and, in so doing, offer reinstatement to those employees displaced by our termination of the contract with Santa Fe, without prejudice to their seniority and other rights and privileges, and make them whole for any loss of pay and other benefits suffered by them on and after July 17, 1974.

MOBIL OIL CORPORATION
(Employer)

Dated February 1975 By
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered,

defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Region 19—Federal Building, 29th Floor, 915 Second Avenue, Seattle, Washington 98174—Telephone No. (206) 442-4532

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALASKA ROUGHNECKS and DRILLERS ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-3049

OPINION

MOBIL OIL CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 75-3328

On Petition to Review a Decision of the National Labor Relations Board

Before: LUMBARD,* WRIGHT and ANDERSON, Circuit Judges.

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*Senior Circuit Judge for the Second Circuit.

WRIGHT, Circuit Judge:

This appeal tests the validity of an order of the National Labor Relations Board which held that Mobil Oil Company [Mobil] violated sections 8(a)(1) and (5) of the National Labor Relations Act [29 U.S.C. § § 158(a)(1) and (5) (1970)]. It found that Mobil unlawfully refused to bargain with the union representing the employees of Santa Fe Drilling Company which had subcontracted with Mobil to perform drilling operations on an offshore oil drilling platform. The Board asks enforcement, Mobil asks reversal, and the union seeks to have the order modified.

I.

FACTS

A. *Before Union Involvement.*

The situs of this case is the Granite Point Platform, one of several offshore platforms in Cook Inlet, near Anchorage, Alaska. Mobil's financial interest in this platform is substantial, approximately $50,000,000. Although Union Oil Company has a one-quarter interest in the platform, Mobil alone operates it. Beginning in 1969, Mobil has awarded contracts for the drilling and other parts of the operation under a competitive bidding procedure. Throughout the operation Mobil has had some of its own employees on the platform for pollution control, safety measures, and other reasons.

By bidding competitively Santa Fe Drilling Company, a division of Santa Fe International Corporation, had been awarded the contract for drilling operations since 1969. This large company performs oil field services globally for many oil companies.

The contract in issue, executed in 1972, obligated Santa Fe *inter alia* to furnish employees "as required by Mobil" and to replace any whose qualifications or performance Mobil found unsatisfactory. In addition, Mobil was to fix employees' work schedules and to provide transportation by helicopter to and from the platform. Although employees' wages and fringe benefits were also specified in the contract (with a provision for adjustment to reflect changes in the industry), the employees were on Santa Fe's payroll and Santa Fe paid their insurance, taxes, and other deducted items.

In consideration for Santa Fe's services, Mobil agreed to compensate it on a cost-plus basis. In essence, Mobil made Santa Fe whole for its wage and fringe benefit outlay and other expenses and paid Santa Fe an additional fixed percentage of its costs as profit. The contract provided for termination by either party on 30 days' notice.

Although the record provides abundant data on the manner of performance, it is sufficient to note that Mobil appears to have exercised some supervision of Santa Fe's employees. Pursuant to the contract at least one Mobil employee, a production foreman, was always present on the platform. He actually directed the drilling operations.

Santa Fe's leadmen had at least nominal power to direct the work but in practice they served as conduits between Mobil's foremen and the employees, seldom

giving other than routine directions without clearance from Mobil's foremen. As a check on costs, Mobil's foremen even approved the employees' timesheets on forms supplied by Santa Fe, although Santa Fe actually paid the employees' wages and fringe benefits.

B. *After Union Involvement.*

During the fall of 1973 Alaska Roughnecks and Drillers Association (the "union") engaged in an organizing campaign aimed at all Santa Fe employees in Alaska. As a result the union filed two representation petitions with the Board. The one involved here named Santa Fe as the employer and Santa Fe was notified of, and participated in, the hearing conducted by the Board pursuant to the union's petitions.

At the hearing the union stipulated that Santa Fe was the employer and the Board's Regional Director so found. No claim was made that Mobil was either the employer or a joint employer with Santa Fe. Although the union proposed a single unit for both the Granite Point Platform and another one operated by Marathon Oil Company, the Regional Director established a separate unit for the Granite Point group.

As a result of the representation hearing the Board certified the union as the bargaining agent for the Granite Point unit in January, 1974. Anticipating that collective bargaining would result in higher wages for the unit employees, Santa Fe notified Mobil in February 1974 that it would ask Mobil for an increase in wages and fringe benefits specified in the contract should wages increase.

Within a month the union and Santa Fe commenced bargaining. Expecting that bargaining would result in higher wages and benefits, Mobil decided to seek new

bids for the drilling operations. It invited five contractors, including Santa Fe, to submit bids. Only Sante Fe responded, but after bids were due V.E. Construction Company asked and was permitted to bid.

V.E.'s bid was lower than Santa Fe's (it provided for fewer fringe benefits) and Mobil staff recommended in late April or early May that it be accepted. Consequently, on June 14, 1974 Mobil gave Santa Fe its thirty-day notice of termination and then contracted with V.E. Construction Company.

Meanwhile, negotiations between Santa Fe and the union had been unsuccessful despite the use of a federal mediator. On May 29, 1974, the employees struck. When Santa Fe received Mobil's termination notice it notified the union on *June 21,* 1974 that it would bargain with the union about the contract termination. On *June 26,* 1974 the union for the first time asked Mobil to bargain as a "successful employer."[1]

Mobil refused to bargain and on July 5, 1974, the union filed charges of unfair labor practices with the Board, claiming that Mobil was a *successor employer.* After investigation, the Regional Director refused to issue a complaint and the union appealed. The Board's General Counsel sustained the appeal and issued a complaint charging Mobil, as a *joint employer* with Santa Fe, with violating sections 8(a)(1) and (5) of the Act.

The case was tried before an administrative law judge who found that Mobil, as a joint employer with Santa Fe, had violated the Act as charged. Reinstatement of all employees and of the Santa Fe contract, plus full back pay, were ordered. Mobil appealed. The Board modified only the remedy by denying reinstatement and granting

[1] For a recent examination of what constitutes a successor employer, *see Pacific Hide & Fur Depot, Inc. v. NLRB,* No. 76-2074 (9th Cir. May 4, 1977).

back pay from the date the Santa Fe contract was terminated until Mobil agreed to bargain with the union.

Mobil has petitioned for review of the Board's decision, claiming *inter alia* that the union's June 26 request to bargain was untimely and that Mobil was not required to bargain as a joint employer. The union also petitioned for review, claiming that reinstatement should have been ordered. In response to both petitions, the Board cross-petitioned, seeking enforcement of its order. The two appeals have been consolidated. There is no contention, nor is there support in the record for any, that Mobil was guilty of anti-union bias.

II.

DUE PROCESS – NOTICE AS A PREREQUISITE TO THE DUTY TO BARGAIN

The unfair labor practices involved are predicated on the Board's finding that Mobil, as a joint employer with Santa Fe, unlawfully refused to bargain. The Board found that Mobil was a joint employer primarily because of the control it exercised over Santa Fe's employees. But the extent of Mobil's control is not determinative of this appeal. The appeal presents the question whether Mobil could refuse to bargain with the union when it was neither afforded an opportunity to participate in the certification proceedings nor requested by the union to bargain until after Mobil terminated its contract with Santa Fe. As we shall see, our answer is that Mobil acted lawfully.

The conceptual basis for our decision is due process. Its application to NLRB proceedings, like other administrative proceedings, is not novel. *See NLRB v. Welcome-American Fertilizer Company*, 443 F.2d 19, 20 (9th Cir. 1971); *NLRB v. Jordan Bus Company*, 380 F.2d 219,

222-23 (10th Cir. 1967); *Russell-Newman Mfg. Co. v. NLRB*, 370 F.2d 980, 984 (5th Cir. 1966). Two closely related aspects of procedural due process are involved. One is the requirement of notice and an opportunity to be heard:

> "The fundamental requirement of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

Goldberg v. Kelly, 397 U.S. 254, 267-8 (1970).

The other relevant aspect of due process relates to the Board's own regulations for certification proceedings, 29 C.F.R. §§102.61 *et seq.* As we stated in *NLRB v. Welcome-American Fertilizer Company, supra* at 20:

> When administrative bodies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process.

These principles demonstrate that if we are to affirm the Board's finding of Mobil's joint employer status (and the resultant unfair labor practices), the record must reveal that Mobil was afforded notice and a timely opportunity to challenge that finding. There is no such evidence.

What the record does indicate is that the first notice

Mobil received that anyone believed it to be an employer of Santa Fe's employees was when the union asked it to bargain. Even then it was not notified it was a joint employer. The union asked only that Mobil bargain as a *successor employer.* Not until the Board issued a complaint charging Mobil with unfair labor practices was Mobil notified of its duty to bargain as a *joint employer.* Because Mobil had already terminated its contract with Santa Fe, the notice was clearly untimely.

Perhaps the employer could have anticipated its duty to bargain, but the Act imposes no such duty. As the Supreme Court held in *NLRB v. Columbian Co.*, 306 U.S. 292, 297 (1939):

> Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer – when he has not refused to receive communications from his employees – without some indication given to him by them or their representatives of their desire or willingness to bargain.

Therefore, because due process necessitates notice and a *meaningful* opportunity to be heard, we hold that the notice to Mobil and opportunity to be heard were wholly inadequate.

Although Mobil may have been aware of the union's activities before the union requested bargaining, the record also indicates that Mobil knew that the Board conducted certification proceedings in which it was not asked to participate. The Board's regulations provide that the petition for certification *shall* contain the employer's name and that the employer *shall* be notified of the hearing. 29 C.F.R. §§ 102.61, 102.63. They also specify a procedure for amending the petition which

shall contain the employer's name. 29 C.F.R. § 102.61(c). In this case the union named Santa Fe in the original petition and never attempted to file an amended petition to include Mobil as a joint employer.

Because Mobil was neither named as an employer nor given an opportunity to object as permitted by 29 C.F.R. § 102.63, it was entitled to rely on the certification result that Santa Fe was the employer, not Santa Fe *and* Mobil.

As we have noted, failure to follow promulgated rules tends to deny adequate notice. *NLRB v. Welcome-American Fertilizer, supra* at 20. Relying on regulations which do provide for adequate notice, Mobil terminated its Santa Fe contract before having either notice of its alleged status as employer, or any duty to bargain. Relying on those regulations, we hold that the notice received was inadequate.

NLRB v. Jordan Bus Co., supra, supports our holding that Mobil was entitled to notice and an opportunity to challenge its status as employer at the Board certification proceedings. In *Jordan,* Denco alleged that it was denied due process because the original representation petition of the union sought only to represent the Jordan drivers and thus only Jordan had notice of the evidentiary hearing. The union was also allowed to amend its petition to include Denco, however, alleging it to be a single employer with Jordan. The court stated:

> [A]lthough the Board's regulations make no provision for the minimum length of time required between notice and the representation hearing, it is certain that notice on the day of the hearing is not reasonable notice . . . . The Board advances the somewhat incredible contention that since Jordan and Denco constituted a single employer, notice to Jordan

> was notice to Denco. But, this assumes the existence of a single employer status – the very issue to be resolved at the hearing – and Denco is certainly entitled to a reasonable opportunity to present evidence on this issue.

380 F.2d at 223.

Although the court ultimately concluded that Denco had been afforded ample opportunity to challenge its status as employer, this was only because Denco failed to indicate it could produce evidence that it was not the employer. The court did not reason, as the Board urges here, that the results of the representation proceeding should be ignored. On the contrary, as the quoted passage indicates, the representation proceeding, not the unfair labor practice proceeding, is where employer status should be litigated. Because Mobil had no opportunity to participate in the representation proceeding, it was not accorded due process. *See also Potter v. Castle Construction Co.*, 355 F.2d 212 (5th Cir. 1966).

The Board contends that because Mobil was a joint employer with Santa Fe and the latter was notified of the certification proceedings, Mobil received adequate notice. It relies principally on three cases to support its position: *Ace-Alkire Freight Lines, Inc. v. NLRB*, 431 F.2d 280, 282 (8th Cir. 1970); *NLRB v. Dayton Coal & Iron Corp.*, 208 F.2d 394 (6th Cir. 1953); *NLRB v. Long Lake Lumber Co.*, 138 F.2d 363 (9th Cir. 1943). We do not read them to support that position.

Ace-Alkire did involve a situation in which the Board's representation proceeding was not the method utilized to ascertain the proper parties for collective bargaining. But the method that was utilized, presentation of cards signed by the majority of employees, afforded notice to both

employers claimed to be joint employers because both were approached with cards by the union.

Dayton Coal might be relevant but the opinion does not indicate what method was utilized or whether Dayton received notice and an opportunity to challenge its status as employer. We cannot therefore view it as supporting the Board's position.

In *Long Lake Lumber*, as in *Ace-Alkire*, certification proceedings were not involved. Long Lake, the party contesting its joint employer status, actively intervened in the labor dispute between Robinson, its contractor, and the union. Had Mobil either intervened in Santa Fe's labor dispute with the union, as in *Long Lake*, or been approached by the union earlier, as in *Ace-Alkire*, those cases might be relevant. Because neither event occurred, however, the Board's finding that Mobil was a joint employer cannot be sustained.

The petition to review the decision and order of the Board is granted, the Board's order is set aside, the Board's petition to enforce its order is denied, and the union's cross-petition is dismissed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA ROUGHNECKS AND DRILLERS ASSOCIATION, *Petitioner,*	)	
v.	)	No. 75-3049
NATIONAL LABOR RELATIONS BOARD, *Respondent.*	)	

* * * * * * * * * * * * * * *

MOBIL OIL CORPORATION, *Petitioner,*	)	
v.	)	No. 75-3328
NATIONAL LABOR RELATIONS BOARD *Respondent.*	)	

JUDGMENT

Before: Lumbard,* Wright and Anderson, Circuit Judges.

*Senior Circuit Judge for the Second Circuit

The above consolidated causes came on to be heard upon the petitions of Alaska Roughnecks and Drillers Association and Mobil Oil Corporation to review an order of the National Labor Relations Board issued on July 26, 1975, against petitioner in No. 75-3328 and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 5, 1977, and has considered the briefs and transcript of record filed in this cause. On June 14, 1977, the Court issued an opinion granting the petition to review in No. 75-3328, setting aside and denying enforcement of the Board's order and dismissing the Union's petition for review of said order in No. 75-3049. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the United States Court of Appeals for the Ninth Circuit Court that enforcement of the order of the National Labor Relations Board directed against Mobil Oil Corporation, its officers, agents, successors, and assigns be and it hereby is set aside and denied.

Endorsed, Judgment Filed and Entered

SO ORDERED:	/s/ Emil E. Melfi, Clerk
A TRUE COPY,	/s/ J. Edward Lumbard CIRCUIT JUDGE
ATTEST: Emil E. Melfi Clerk	/s/ Eugene A. Wright CIRCUIT JUDGE
By: Vivienne L. Thompson Deputy	/s/ J. Blaine Anderson CIRCUIT JUDGE

August 19, 1977

IN THE SUPREME COURT FOR
THE UNITED STATES OF AMERICA

October Term, 1977

NO.

ALASKA ROUGHNECKS AND DRILLERS ASSOCIATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 75-3049 (9th Circuit Court of Appeals)

MOBIL OIL CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 75-3328 (9th Circuit Court of Appeals)

MOTION FOR EXTENTION OF TIME WITHIN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

Petitioner moves that the time within which it may file a petition for Writ of Certiorari to review the judg-

ment of the Court of Appeals for the Ninth Circuit entered on the nineteenth day of August, 1977, in the causes consolidated and pending therein entitled *Alaska Roughnecks and Drillers Association v. National Labor Relations Board,* No. 75-3049, and *Mobil Oil Corporation v. National Labor Relations Board,* No. 75-3328, be extended from the seventeenth day of November, 1977, to and including the second day of January, 1978.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

JUDGMENT SOUGHT TO BE REVIEWED

The consolidated judgment of the Court of Appeals for the Ninth Circuit was made and entered on August 19, 1977, following an Opinion issued on June 14, 1977. Copies of the Judgment and Opinion are appended hereto as Exhibits "A" and "B", respectively.

REASONS WHY EXTENTION OF TIME IS JUSTIFIED

There are presently no printers in the State of Alaska who are able to print the Petition for Writ of Certiorari in accordance with the Rules of the Supreme Court. The Petition must therefore be sent to Washington, D.C. to be printed, returned to Alaska to be proofread, and then submitted to the Court. See Affidavit, Exhibit "C".

RESPECTFULLY SUBMITTED this 2nd day of November, 1977.

BIRCH, HORTON, BITTNER & MONROE

BY /s/ Hal R. Horton
Birch, Horton, Bittner & Monroe
733 W. Fourth Avenue
Anchorage, Alaska 99501

SUPREME COURT OF THE UNITED STATES

No. A-405

ALASKA ROUGHNECKS AND DRILLERS ASSOCIATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 23, 1977.

/s/ William H. Rehnquist
ASSOCIATE JUSTICE OF THE
SUPREME COURT OF THE UNITED STATES

Dated this 5th Day of November, 1977.

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29 U.S.C. 158(a)(1)

It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.

29 U.S.C. 158(a)(5)

It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 159(a) of this title.

29 U.S.C. 159

Representatives and elections – Exclusive representatives; employees' adjustment of grievances directly with employer.

(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board –

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have

presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 160(c) of this title.

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling.

29 C.F.R. 102.61

Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a, A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that the employer declines to recognize the petitioner as the representative

within the meaning of section 9(a) of the act or that the labor organization is currently recognized but desires certification under the act.

(8) The name, affiliation, if any, and address of the petitioner.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(b) A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date.

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the

approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(c) Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) Name and address of the petitioner and affiliation, if any.

(5) Name or names of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the act.

(7) The number of employees in the unit.

(8) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(9) Any other relevant facts.

(d) A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner.

(11) Any other relevant facts.

(e) A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner.

(8) Any other relevant facts.

29 C.F.R. 102.62

Consent-election agreements.

(a) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into a consent-election agreement leading to a determination by the regional director of the facts ascertained after such consent election. Such agreement shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of con-

ducting such consent election shall be consistent with the method following by the regional director in conducting elections pursuant to §§102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certification of representatives where appropriate, with the same force and effect as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for a waiver of hearing and a consent election leading to a determination by the Board of the facts ascertained after such consent election, if such a determination is necessary. Such agreement shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such consent election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the postelection procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§102.69 and 102.70

29 C.F.R. 102.63

Investigation of petition by regional director, notice of hearing; service of notice; withdrawal of notice.

(a) After a petition has been filed under §102.61 (a), (b), or (c), if no agreement such as that provided in §102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under §102.61 (d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended

or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in conformance with §§102.64 through 102.68 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in §102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissal of petitions without a hearing shall not be governed by §102.71. The regional director's dismissal shall be by decision and a request for review therefrom may be obtained under §102.67 except where an agreement under §102.62(a) is involved.

No. 77-912

In the Supreme Court of the United States

OCTOBER TERM, 1977

ALASKA ROUGHNECKS AND DRILLERS ASSOCIATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

JOHN S. IRVING,
General Counsel,
National Labor Relations Board,
Washington, D.C. 20570.

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1. The Board found that Mobil Oil Corp. (herein "Mobil") violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 140, 141, 29 U.S.C. 158(a)(5) and (1), by failing to bargain with petitioner (herein "the Union") about its decision to terminate a subcontract with Santa Fe Drilling Company (herein "Santa Fe"), and the effects of such termination on the employees performing work under the subcontract. The facts are as follows.

Mobil owned a major interest in, and was the operator of, an offshore oil drilling platform near Anchorage, Alaska. In 1972, Mobil entered into a contract with Santa Fe under which the latter conducted drilling and

production operations for Mobil. During the period relevant to the Board proceedings, there were on the platform approximately 13 production employees, including two leadmen, who were furnished by Santa Fe. In addition, there were two production foremen, furnished by Mobil, who closely supervised the platform's operations, including the activities of the 13 employees. (Pet. App. 12a-14a.)

In the fall of 1973, the Union petitioned the Board for a representation election among all employees on the platform, excluding, *inter alia*, leadmen and other supervisors. The Union stipulated, and the Board's Regional Director found, that Santa Fe was the employer of the employees on the platform. There was no claim that Mobil was a joint employer, and Mobil did not participate in the proceeding. The Union won the election, and, in January 1974, was certified as the representative of the Santa Fe employees on the platform. (Pet. App. 12a-13a.) Thereafter, the Union and Santa Fe entered into bargaining negotiations. Faced with the prospect of increased labor costs, Santa Fe asked Mobil for an increase in payments under their cost-plus contract. Mobil refused and advertised for bids for a replacement for Santa Fe. Upon locating another contractor, Mobil notified Santa Fe, on June 14, 1974, that the contract would be terminated as of July 17. On June 21, Santa Fe notified the Union of the termination of its contract with Mobil. (Pet. App. 15a-17a.) The Union thereupon wrote Mobil requesting negotiations with it as a "successor employer." Mobil refused to bargain with the Union, which then filed a charge with the Board. The Board's General Counsel issued a complaint alleging that Mobil was a "joint employer" with Santa Fe, and that it had violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union. (Pet. App. 17a-18a, 39a.)

The Board, finding that Mobil's supervisors exercised daily control over the employees supplied by Santa Fe, concluded that Mobil and Santa Fe were joint employers of those employees.[1] Mobil thus was required to bargain with the Union about the decision to terminate the Santa Fe subcontract and the effects of that decision upon the employees. By failing to do so, Mobil violated Section 8(a)(5) and (1) of the Act. (Pet. App. 1a-3a, 18a-24a.) The Board ordered Mobil to bargain with the Union and to compensate the displaced employees for their losses in pay (Pet. App. 6a).

2. The court of appeals denied enforcement of the Board's order. The court reasoned that, since the Board's representation procedures specify that notice "shall" be given to the "employer" and since Mobil was not identified as the employer or a joint employer in the representation proceeding, Mobil was entitled to assume that Santa Fe was the employer of the platform employees in the absence of any demand made on Mobil by the Union. Therefore, Mobil did not violate Section 8(a)(5) of the Act by unilaterally terminating its Santa Fe contract because the termination occurred before the Union's June 26, 1974 bargaining demand on Mobil. (Pet. App. 41a-43a.)

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[1]A joint employer is one who shares control over employees and their terms and conditions of employment with another employer. See *National Labor Relations Board* v. *Greyhound Corp.*, 368 F. 2d 778, 780-781 (C.A. 5). His bargaining obligation is coterminous with that of the other joint employer. See *Ref-Chem Co.*, 169 NLRB 376, 379-380, enforcement denied on other grounds, 418 F. 2d 127 (C.A. 5). On the other hand, a successor employer has no bargaining obligation respecting the predecessor employer's employees unless he takes over those employees and continues substantially the same operations as the predecessor employer. See *National Labor Relations Board* v. *Burns International Security Services*, 406 U.S. 272, 279-281.

3. The question presented is whether the court below properly concluded that, because Mobil was not named as an employer of the Santa Fe employees in the Board representation proceeding, it could not be on notice that it was legally required to bargain with the Union as the representative of those employees until the Union made a formal demand upon it (which occurred after Mobil took the unilateral action complained of). The Board believes that the court's conclusion is erroneous, for if, as the Board found, Santa Fe and Mobil were joint employers, Mobil was bound by Santa Fe's knowledge of a bargaining obligation to the Union, which arose when the Board certification issued (see note 1, *supra*).[2] However, the Board did not petition for a writ of certiorari because, in its judgment, the question is tied to the rather unusual facts of this case. Should this Court grant the Union's petition for certiorari, the Board will defend its decision and order.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
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National Labor Relations Board.

FEBRUARY 1978.

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[2]Mobil was not prejudiced by its failure to participate in the representation proceeding, for in the unfair labor practice proceeding it was afforded an opportunity to, and did, litigate the question whether it was in fact a joint employer (Pet. App. 18a-20a).

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